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JOSE PARADA-VELAZQUEZ

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
(HON. JANIS L. SAMMARTINO)

UNITED STATES OF AMERICA,	)	Crim. Case No. 08CR0682-07-JLS
	)	
Plaintiff,	)	STATEMENT OF FACTS AND
	)	POINTS AND AUTHORITIES
v.	)	IN SUPPORT OF MOTIONS
	)	
JOSE PARADA-VELAZQUEZ,	)	
	)	
Defendant.	)	NCD: June 13, 2008
	)	at 1:30 p.m.

**I. STATEMENT OF FACTS**

The defendant, JOSE PARADA-VELAZQUEZ, is charged in this multi-count multiple defendant alien smuggling indictment as set out in the previously filed discovery motion at CR 50-2.

While the defense does not yet have any discovery report regarding the arrest, it appears that the defendant was arrested on about March 12, 2008, on a warrant based on the indictment.

While the defense does not yet have any discovery report regarding a search and seizure, the government has informally advised there may be such evidence. The defense requests leave to bring a motion if appropriate upon receipt of search information.

While the defense does not yet have any discovery report — including a copy of *Miranda* warnings or waiver thereof — the defense has received a video of post-arrest questioning. Based on the video itself, it is unlikely that the defendant's post-arrest custodial questioning was not preceded by a knowing and intelligent waiver of his privilege against self-incrimination and his right to

1 retained or court-appointed counsel.

2 The video of the post-arrest questioning shows that immediately after the law enforcement  
3 agent reads the defendant rights in Spanish; the defendant asks am I going to talk to an attorney and  
4 the agent responds no, right now do you understand your rights. And the interrogating agent never  
5 directly revisited the matter. (See the attached declaration of Investigator Alejandro Amigo).

## 6 **II. POINTS AND AUTHORITIES**

### 7 A. MOTION TO SUPPRESS STATEMENTS MADE BY THE DEFENDANT AS OF 8 THE TIME THE DEFENDANT WAS IN CUSTODY

#### 9 1. Introduction

10 The defense moves to suppress any and all statements of defendant after custody and any  
11 fruits thereof on Miranda, and voluntariness grounds.

12 The declarations of the defendant and Spanish-speaking investigator Alex Amigo are  
13 attached.

14 The defense requests that the motion to suppress be granted on the face of the record.

15 Alternatively, the defense requests an evidentiary hearing.

16 The declaration of the defendant alone demonstrates that the defendant was subjected to  
17 custodial interrogation, that questioning proceeded without the presence of an attorney, and a  
18 statement was taken. As a result, as a matter of constitutional law, the government must meet a  
19 “heavy burden” of demonstration that “the defendant knowing and intelligently waived his privilege  
20 against self-incrimination and his right to retained or appointed counsel.” Miranda v. Arizona, 384  
21 U.S. 436, 475 (1966).

#### 22 2.. Miranda

23 An individual is in custody when, under the circumstances, “a reasonable person [would]  
24 have felt he or she was not at liberty to terminate the interrogation and leave.” Thompson v.  
25 Keohane, 516 U.S. 99, \_\_\_, 116 S.Ct. 457, 465 (1995).

26 The Government must prove that this defendant knowingly, intelligently, and voluntarily  
27 waived his rights against self-incrimination and to counsel, and must prove that the statements taken  
28 from this defendant were obtained in compliance with the defendant's Fifth and Sixth Amendment

1 rights in the context of custodial interrogation. Miranda v. Arizona, *supra*, 384 U.S. 436, 445, 86  
2 S.Ct. 1602, 1612, 16 L.Ed. 694 (1966).

3 “Our holding will be spelled out with some specificity in the pages  
4 which follow but briefly stated it is this: the prosecution may not use  
5 statements, whether exculpatory or inculpatory, stemming from  
6 custodial interrogation of the defendant unless it demonstrates the use  
7 of procedural safeguards effective to secure the privilege against self-  
8 incrimination. By custodial interrogation, we mean questioning  
9 initiated by law enforcement officers after a person has been taken into  
10 custody or otherwise deprived of his freedom of action in any  
11 significant way. As for the procedural safeguards to be employed,  
12 unless other fully effective means are devised to inform accused  
13 persons of their right of silence and to assure a continuous opportunity  
14 to exercise it, the following measures are required. Prior to any  
15 questioning, the person must be warned that he has a right to remain  
16 silent, that any statement he does make may be used as evidence  
17 against him, and that he has a right to the presence of an attorney,  
18 either retained or appointed. The defendant may waive effectuation of  
19 these rights, provided the waiver is made voluntarily, knowingly and  
20 intelligently. If, however, he indicates in any manner and at any stage  
21 of the process that he wishes to consult with an attorney before  
22 speaking there can be no questioning. Likewise, if the individual is  
23 alone and indicates in any manner that he does not wish to be  
24 interrogated, the police may not question him. The mere fact that he  
25 may have answered some questions or volunteered some statements on  
26 his own does not deprive him of the right to refrain from answering  
27 any further inquiries until he has consulted with an attorney and  
28 thereafter consents to be questioned.” *Id.* at 384 U.S. at 445, 86 S.Ct.  
at 1612, 16 L.Ed.2d at 706-07. (Footnote omitted.) (Emphasis added.)

17 “If the interrogation continues without the presence of an attorney and  
18 a statement is taken, a heavy burden rests on the government to  
19 demonstrate that the defendant knowingly and intelligently waived his  
20 privilege against self-incrimination and his right to retained or  
21 appointed counsel. This Court has always set high standards of proof  
22 for the waiver of constitutional rights, and we re-assert these  
23 standards as applied to in-custody interrogation. Since the State is  
24 responsible for establishing the isolated circumstances under which the  
25 interrogation takes place and has the only means of making available  
26 corroborated evidence of warnings given during incommunicado  
27 interrogation, the burden is rightly on its shoulders.” *Id.*, 384 U.S. at  
28 475, 86 S.Ct. at 1628. (Citation omitted.) (Emphasis added.)

24 The failure to advise a defendant that anything said “can and will” be used against you render  
25 warnings inadequate. As the Ninth Circuit stated in Collazo v. Estelle, 940 F.2d 411, 418 (9th Cir.  
26 1991) (*en banc*), cert. denied, 112 S.Ct. 870 (1992):

27 “Miranda’s stated purpose [is] of making ‘the individual more acutely  
28 aware that he is faced with a phase of the adversary system - that he is  
not in the presence of persons acting solely in his interest.’”

1 The Court referenced that part of the Miranda decision where the Supreme Court stated:

2 “The warning of the right to remain silent must be  
3 accompanied by the explanation that anything said can and will be  
4 used against the individual in court. This warning is needed in order to  
5 make him aware not only of the privilege, but also of the consequences  
6 of forgoing it. It is only through an awareness of these consequences  
7 that there can be any assurance of real understanding and intelligent  
8 exercise of the privilege. Moreover, this warning may serve to make  
9 the individual more acutely aware that he is faced with a phase of the  
10 adversary system--that he is not in the presence of persons acting  
11 solely in his interest.” Miranda v. Arizona, 348 U.S. 436, 469 (1966).  
(Emphasis added.)

8 Under the circumstances here, the questions were reasonably likely to elicit an incriminating  
9 response from the suspect when they were asked; and so, had to be preceded by Miranda warnings.  
10 United States v. Mata-Abundiz, 717 F.2d 1277 (9<sup>th</sup> Cir. 1983).

11 Finally, in the absence of discovery, it is unknown if Missouri v. Seibert, 542 U.S. 600, 124  
12 S.Ct. 2601 (2004) is applicable. The Court must suppress the post warning confession obtained  
13 during a deliberate two-step interrogation — within the meaning of Seibert — where the midstream  
14 Miranda warning was objectively ineffective to apprise the suspect of his rights. United States v.  
15 Williams, 435 F.3d 1148, 1150, 1159 (9<sup>th</sup> Cir. Jan. 30, 2006).

#### 16 Voluntariness.

17 Before a confession or any self-incriminating statement made orally or in writing is  
18 admissible in evidence, the Court must determine that the confession was given voluntarily. Lego v.  
19 Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 626, 30 LED 2d 618 (1972); 18 U.S.C. §3501(a). The  
20 government bears the burden of establishing the confession’s voluntariness. Lego v. Twomey,  
21 *supra*; United States v. Jenkins, 938 F.2d 934, 937 (9th Cir. 1991).

22 “The ultimate test remains that which has been the only clearly  
23 established test in Anglo-American courts for two hundred years: the  
24 test of voluntariness. Is the confession the product of an essentially  
25 free and unconstrained choice by its maker: If it is, if he has willed to  
26 confess, it may be used against him. If it is not, if his will has been  
overborne and his capacity for self-determination critically impaired,  
the use of his confession offends due process.” Schneckloth v.  
Bustamonte, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 36 LED 2d 854  
(1973). United States v. Jenkins, 938 F.2d 934, 938 (9th Cir. 1991).

27 Also “the admissibility of a confession turns as much on whether the techniques for  
28 extracting the statements ... are compatible with a system that presumes innocence and assures that a

conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." Miller v. Fenton, 474 U.S. 104, 116, 106 S.Ct. 445, 452, 88 LED. 2d 405 (1985); United States v. Jenkins, *supra*.

In considering whether a confession is voluntary the Court must take into consideration all the circumstances surrounding the giving of the confession. Schneckloth v. Bustamonte, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 2047, 36 LED. 2d 854 (1973); 18 U.S.C. §3501(b). Relevant factors include past history, education, delay, threats, and promises. An unlawful arrest is a relevant factor. A Court must specifically consider the following five factors under 3501(b):

(1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was

without the assistance of counsel when questioned and when giving such confession.

B. LEAVE TO FILE FURTHER PRETRIAL MOTIONS AND FURTHER HEARING DATE.

The defense requests leave to file further pretrial motions and a further hearing date as the facts are further developed and the defense has had the opportunity to review additional discovery.

### III. CONCLUSION

For these reasons and any further reasons which come to this Court's attention prior to or at the time of the hearing of these motions, counsel respectfully requests that this Court grant these motions.

Respectfully submitted,

Dated: May 30, 2008

s/Gerald T. McFadden  
GERALD T. McFADDEN, Attorney for  
Defendant JOSE PARADA-VELAZQUEZ  
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JOSE PARADA-VELAZQUEZ  
6

7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10 (HON. JANIS L. SAMMARTINO)

11 UNITED STATES OF AMERICA, )  
12 Plaintiff, )  
13 v. )  
14 JOSE PARADA-VELAZQUEZ, )  
15 Defendant. )

Crim. Case No. 08CR0682-07-JLS

DECLARATION OF DEFENDANT  
REGARDING MOTION TO SUPPRESS

NCD: June 13, 2008  
at 1:30 p.m.

16 I, JOSE PARADA-VELASQUEZ, hereby state under penalty of perjury, that:

17 I am charged as a defendant in the indictment in the above-captioned case.

18 I was arrested and taken into custody by United States police on about March 12, 2008.

19 At a police station: I did not have an attorney, I was given some warnings and I asked a  
20 question about them, I was questioned about facts which are related to the charges against  
21 me in the indictment, and I made statements.  
22

23 Executed this 29 day of May, 2008 at San Diego, California.

24 Jose Parada V.  
25 JOSE PARADA-VELASQUEZ

26 I, Alejandro Amigo, defense investigator, translated  
27 the above into the Spanish language.  
28



5/29/08



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JOSE PARADA-VELAZQUEZ  
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7

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10 (HON. JANIS L. SAMMARTINO)

11 UNITED STATES OF AMERICA,	)	Crim. Case No. 08CR0682-JLS
	)	
12 Plaintiff,	)	DECLARATION OF INVESTIGATOR RE:
	)	VIDEO OF DEFENDANT'S POST-
13 v.	)	ARREST STATEMENT
	)	
14 JOSE PARADA-VELAZQUEZ,	)	NCD: June 13, 2008
	)	at 1:30 p.m.
15 Defendant.	)	Hon. Janis L. Sammartino

16

17 I, ALEJANDRO AMIGO, declare, under penalty of perjury, as follows:

- 18 1. I am the appointed investigator for the above-captioned defendant working for  
19 attorney Gerald T. McFadden..
- 20 2. I received a DVD-R in discovery from the United States Attorney's Office, marked  
21 "OPERATION BLACKJACK, Post Arrest Interview of Jose Parada-Velazquez".  
22 This DVD-R contains the video recorded statement of defendant Jose Parada-  
23 Velazquez. The defendant was arrested on March 12, 2008 although on the actual  
24 video the date is Nov-28-07 at 11:57:50 A, which is in the Spanish Language.
- 25 3. I am proficient in the Spanish Language, as it is my secondary native language, and  
26 have interpreted and translated for Mr. McFadden on at least more than 100 cases as  
27 well as for other attorneys in this District.  
28

1 4. I viewed the aforementioned video in the presence of Mr. McFadden and translated to  
2 him the actual contents discussed on the video, by all parties.

3 5. If called as a witness I could attest to the following:  
4

5 The defendant is questioned by two different agents (referred to as Agent #1 and Agent #2  
6 hereinafter). Agent #1 reads the defendant rights, very fast so the below is not verbatim. After  
7 Agent #1 reads the rights, he asks the defendant if he has any questions and the defendant asks "am I  
8 going to talk to an attorney", even before the defendant finishes asking this question Agent #1 says  
9 "no", while simultaneously waving his hand in the negative. Then Agent #1 tells defendant "no,  
10 right now do you understand your rights?". Then Agent #1 advises defendant that they want to talk  
11 to him and this is his opportunity to talk and to see what's going on.

12 Then Agent #2 interrupts and states, to the defendant, "he is reading you your rights because  
13 you are being arrested for Title 8 USC 1326, being here illegally". The defendant then states "I'm  
14 being arrested for being here illegally?". Agent #1 then tells defendant "amongst other things".  
15 Then Agent # 1, referring to a document, tells defendant "this is the waiver and these are your  
16 words", reading from a form, obviously not in the literal language, then asks the defendant "so you  
17 are in agreement to talk with me?". The defendant nods in the affirmative and Agent # 1 presents  
18 defendant with the referred document for his signature.

19 Neither Agent #1 nor Agent #2 ever revisited the defendant's question about speaking to an  
20 attorney or clarifying Agent #1's statement in response to the defendant's questioning regarding  
21 speaking to an attorney and of Agent #1's answer of "no".  
22

23 I declare under penalty of perjury the aforementioned to be true and correct to the best of my  
24 knowledge, under the laws of the United States of America. Signed this 30<sup>th</sup> day of May 2008 in the  
25 City of San Diego, County of San Diego and State of California.  
26

27   
28 ALEJANDRO AMIGO, Investigator for  
Defendant JOSE PARADA-VELAZQUEZ  
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